

Deadline for Federal Removal in Multi-Defendant Litigation in the District of Connecticut

By Jona Kim

If you want to remove a multi-defendant case from the Connecticut Superior Court to federal court, you should be aware of the special rules that apply to multi-defendant cases. The removal statute, 28 U.S.C. § 1446(b), provides that “[t]he notice of removal of a civil action or proceeding shall be filed within thirty days after receipt by the *defendant*, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based.”¹ The statute’s plain language contemplates removal by a “defendant” without resolving when the thirty-day removal period begins when there are multiple defendants. If you encounter this issue in the District of Connecticut and research case law for guidance, you will find that no case has addressed when the removal period begins to run in multi-defendant litigation. Then the question becomes: how will the District of Connecticut likely determine the removal deadline in multi-defendant litigation?

Nationally, the circuit courts of appeal are split on the question of when the time for removal is triggered if multiple defendants are served at different times. The Fifth Circuit follows the first-served defendant rule, in which the time period for removal begins as to all defendants when the first defendant is served, regardless of when the other defendants are served.² The Fourth, Sixth, Eighth, and Eleventh Circuits have adopted the last-served defendant rule, in which the last-served defendant may remove a case within thirty days of service, and other defendants may consent to the later-served defendant’s removal even if their own removal periods have expired.³ However, neither the U.S. Supreme Court nor the First, Second, Third, Seventh, Ninth, or Tenth Circuits have directly addressed when the removal period begins to run in multi-defendant litigation.⁴

Practitioners seeking to remove cases to the District of Connecticut will find that the District also has not addressed when the removal period begins in multi-defendant litigation.⁵ Similarly, other district courts within the Second Circuit have not provided an obvious answer at first glance. One District of Vermont case addressing multi-defendant removal periods applied the last-served defendant rule, but the New York district courts have come to competing conclusions, with some cases applying the first-served defendant rule and others applying the last-served defendant rule.⁶ However, a closer review of the New York district court split reveals a trend in favor of the last-served defendant rule, following the United State Supreme Court's decision in *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*⁷

Murphy Bros. did not address how the removal statute should be applied in multi-defendant litigation. Interpreting § 1446(b), however, the Supreme Court held that “one becomes a party officially, and is required to take action in that capacity, only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend.”⁸ Therefore, a defendant's time to remove is not triggered until he is “brought under a court's authority, by formal process.”⁹

Most of the post-*Murphy Bros.* cases in New York have acknowledged that the last-served defendant rule necessarily follows from the Supreme Court's decision in *Murphy Bros.* and that it would be illogical to apply the first-served defendant rule when *Murphy Bros.* would not begin to run a later-served defendant's time to seek removal until that defendant received formal service of process.¹⁰ Those New York cases appear to have formed a consensus that the last-served defendant rule is consistent with *Murphy Bros.* because it protects every defendant's removal right, while the first-served defendant rule could cause later-served defendants' rights to “slip away” before those defendants are subject to any court's authority.¹¹ In contrast, none of the New York district court decisions favoring the first-served defendant rule addressed the effect of *Murphy Bros.* on removal in multi-defendant litigation.¹²

Though not dispositive in the District of Connecticut, cases from Vermont and New York in favor of the last-served defendant rule throw the weight of authorities within the Second Circuit in support of that rule. In addition, the *Murphy Bros.* decision's support of the bedrock principle that a defendant is not obligated to engage in litigation until formal service of process undermines the authoritative power of New York's first-served defendant rule cases. Accordingly, while the safest course of action would be to remove as soon as possible, there is credible and persuasive authority to cite to the District of Connecticut in support of applying the last-served defendant rule in interpreting § 1446(b) in multi-defendant litigation. **CL**

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Notes

- 28 U.S.C. § 1446(b) (emphasis added).
- See Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1263 (5th Cir. 1988) (adopting the first-served defendant rule).
- See Barbour v. Int'l Union*, 594 F.3d 315, 326 (4th Cir. 2010) (adopting last-served defendant rule); *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999) (same); *Marano Enters. of Ks. v. Z-Teca Restaurants, L.P.*, 254 F.3d 753, 757 (8th Cir. 2001) (same); *Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202, 1205 (11th Cir. 2008) (same).
- See, e.g., Abdullah v. Am. Prod. Co., Inc.*, 661 F. Supp. 2d 84, 85 (D. Mass. 2009) (noting the First Circuit has not yet endorsed either the first-served or last-served defendant rule); *Lead I JV, LP v. N. Fork Bank*, 2009 U.S. Dist. LEXIS 19777, at *10-11 (E.D.N.Y. Mar. 11, 2009) (noting that multi-defendant removal deadline has not be addressed by the Supreme Court or the Second Circuit); *Delalla v. Hanover Ins.*, 2009 U.S. Dist. LEXIS 96349, at *5 (D.N.J. Oct. 16, 2009) (noting neither the Supreme Court nor the Third Circuit has directly addressed multi-defendant removal deadline); *Save-A-Life Found., Inc. v. Heimlich*, 601 F. Supp. 2d 1005, 1008 (N.D. Ill. 2009) (noting neither the Supreme Court nor the Seventh Circuit has addressed the multi-defendant removal deadline); *United Steel v. Shell Oil Co.*, 549 F.3d 1204, 1208 (9th Cir. 2008) (noting a split of authority on the issue of multi-defendant removal deadline but declining to resolve the issue for the Ninth Circuit); *Day Imaging, Inc. v. Color Labs Enter., L.L.C.*, 2009 U.S. Dist. LEXIS 122268, at *4 (D. Colo. Dec. 11, 2009) (noting the Tenth Circuit has not decided whether to adopt the first-served or last-served defendant rule).
- The District of Connecticut did not address the issue as of November 2010 when this article was sent for publication.
- See, e.g., Pietrangelo, II v. Alvas Corp.*, 664 F. Supp. 2d 420, 429 (D. Vt. 2009) (applying the last-served defendant rule); *compare Yang v. ELRAC, Inc.*, 2004 U.S. Dist. LEXIS 1668, at *3 (S.D.N.Y. Feb. 6, 2004) (applying first-served defendant rule); *Phoenix Global Ventures, LLC v. Phoenix Hotel Assocs., Ltd.*, 2004 U.S. Dist. LEXIS 20977, at *10 (S.D.N.Y. Oct. 19, 2004) (same); *Quinones v. Minority Bus Line Corp.*, 1999 U.S. Dist. LEXIS 5381, at *5 (S.D.N.Y. Apr. 19, 1999) (same) with *Lead I JV, LP*, 2009 U.S. Dist. LEXIS 19777, at *11 (applying the last-served defendant rule); *Glatzer v. Hanley*, 2007 U.S. Dist. LEXIS 34487, at *9 (S.D.N.Y. May 8, 2007) (same); *Barnhart v. Federated Dep't Stores, Inc.*, 2005 U.S. Dist. LEXIS 3631, at *20 (S.D.N.Y. Mar. 8, 2005) (same); *Buechner v. Avery*, 2005 U.S. Dist. LEXIS 13735, at *11 (S.D.N.Y. July 8, 2005) (same); *Piacente v. State Univ. of New York at Buffalo*, 362 F. Supp. 2d 383, 388 (W.D.N.Y. 2004) (same); *Fernandez v. Hale Trailer Brake & Wheel*, 332 F. Supp. 2d 621, 623 (S.D.N.Y. 2004) (same); *In re Tamoxifen Citrate Antitrust Litig.*, 222 F. Supp. 2d 326, 335 (E.D.N.Y. 2002) (same); *Varela v. Flintlock Constr., Inc.*, 148 F. Supp. 2d 297, 300 (S.D.N.Y. 2001) (same).
- 526 U.S. 344 (1999).
- Id.* at 350.
- Id.* at 347.
- See, e.g., Lead I JV, LP*, 2009 U.S. Dist. LEXIS 19777, at *11; *Barnhart*, 2005 U.S. Dist. LEXIS 3631, at *18; *Piacente*, 362 F. Supp. 2d at 388.
- See, e.g., Glatzer*, 2007 U.S. Dist. LEXIS 34487, at *10; *Fernandez*, 332 F. Supp. 2d at 623; *In re Tamoxifen Citrate Antitrust Litig.*, 222 F. Supp. 2d at 334; *Varela*, 148 F. Supp. 2d at 300.
- See, e.g., Yang*, 2004 U.S. Dist. LEXIS 1668, at *3; *Phoenix Global Ventures, LLC*, 2004 U.S. Dist. LEXIS 20977, at *10; *Quinones*, 1999 U.S. Dist. LEXIS 5381, at *5 (*Murphy Bros.* was decided two weeks before this case).